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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1162

RICHARD MATHER BOARDMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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RICHARD MATHER BOARDMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, Richard Mather Boardman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on December 11, 1969.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. No opinion was rendered by the District Court for the District of Massachusetts.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on December 11, 1969, affirming petitioner's conviction dated April 3, 1969. Thereafter a timely

application for extension of time in which to file a petition for a writ of certiorari was filed on December 17, 1969. Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including February 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the First Amendment guarantees encompass and protect a reasonable and non-violent act of dissent which is consistent with an individual's reasonable conscientious religious objection against participation in war in any form?

2. Whether the alternative service provision of the Military Selective Service Act of 1967 violates the free exercise of religion clause of the First Amendment by requiring conscientious objectors to participate in any manner in aid of military service under military or civilian authority?

3. Whether the petitioner, during his trial for an alleged criminal violation of a statutory duty, having acted in a "measured way for reasons of conscience," has a constitutional right under the Ninth Amendment or otherwise to have his jury informed of their power to acquit even if the verdict is contrary to the law and the evidence?

4. Whether the trial court denied the petitioner his constitutional rights under the First, Fifth, Sixth and Ninth Amendments by refusing to allow the jury to weigh or consider the petitioner's conscientious justification with respect to petitioner's alleged criminal violation of a statutory duty?

5. Whether the trial court's charge to the jury defining "wilfully" and delineating the requisite criminal intent,

omitting all reference therein to the petitioner's conscientious objectives, was prejudicial error, thus denying petitioner the right to a fair trial?

Statutory Provisions Involved

United States Code, Title 50, Appendix:

§ 456(j). Deferment and exemptions from training service.

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order

from his local board shall be deemed, for the purposes of section 12 of this title . . . to have knowingly failed or neglected to perform a duty required of him under this title. . . ."

§ 462. Offenses and penalties.

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations, or directions made pursuant to this title . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Statement of the Case

The petitioner, classified by his Selective Service Board in Class I-O, the conscientious objector classification, was convicted at jury trial in the United States District Court of Massachusetts for failure to report to his local draft board for civilian work in violation of the Military Selective Service Act of 1967. 50 App. U.S.C. § 456(j) and § 462(a). Petitioner was sentenced to three years imprisonment by the Honorable Francis J. W. Ford, but has been released on bond without surety pending the outcome of his

appeals. The United States Court of Appeals for the First Circuit affirmed the District Court judgment on December 11, 1969.

The undisputed evidence showed that the local board's order to report was issued in compliance with the statutes and regulations. Prior to the issuance of that order, however, on April 24, 1967, the petitioner had sent his Local Selective Service Board a long letter enclosing with it his notice of classification and his registration certificate (Appendix B, attached hereto). This letter set forth in some detail the development of petitioner's belief that the Selective Service System, the draft and the system of alternative service was inequitable, unjust and contrary to his conscientious opposition to a military system in any form. On October 16, 1967, the date petitioner was ordered to report, his local draft board received a letter from petitioner restating his refusal to comply with the order, based on the "dictates of his conscience" (Government Ex. No. 36), as stated in his prior letter to the board.

The factual circumstances not being in issue, petitioner's counsel attempted to present petitioner's religious, intellectual and conscientious moral development as relevant factors for jury consideration. Counsel argued that evidence demonstrating petitioner's moral character, conviction and conscience is relevant in connection with consideration of the reasonableness of his beliefs and the purpose of his actions in connection with the degree of "wilfulness" necessary for conviction.

As noted by the Court of Appeals, "the trial court rebuffed" (Appendix A *infra* at A-6) all attempts by petitioner's counsel to present evidence on these issues. The record reveals several rulings made by the trial court on the issues of intent and conscience and the power of the jury, relevant to this appeal.

At a conference discussion concerning the petitioner's requested instructions to the jury the trial court stated:

> Willfully, as charged in the indictment, means the refusal to report was committed voluntarily and deliberately, with the knowledge it was prohibited by law and with specific intent to violate the law.
>
> MR. KUNSTLER. You won't add the words "without bad purpose?"
>
> THE COURT. No. [Tr. 2-2.]

At the same conference, on the question of conscience the following instruction was given:

> THE COURT. And you will not argue that the jury can decide this case in accordance with their consciences.
>
> Let me see, I believe you did argue that in the Berrigan case.
>
> MR. KUNSTLER. I started to repeat Hamilton's argument.
>
> . . . . .
>
> THE COURT. You will not argue conscience as a defense, at all, conscience is a basis for defense on the part of the jurors or the conscience of the community. Do we understand one another? [Tr. 2-4, 2-5.]

The trial court denied all petitioner's requested instructions to the jury. Concerning the power of the jury the trial court charged as follows:

> We serve here in two domains. You decide the facts and I lay down the law. If I make a mistake as to the law, it can be corrected in a higher court, the Court of Appeals or the Supreme Court of the United States. If you applied your own law, of course, and

made a mistake, nobody would know what law was applied, and it is obvious, for the proper administration of justice, that you take the law as laid down by the Court. In fact, you must take the law laid down by the Court, and none other. If you took some other law, you would be violating your oath as a juror. [Tr. 3-3.]

And on the question of the requisite "intent" needed to convict the court charged:

> "Willfully," as charged in the indictment means that the refusal to report was committed voluntarily and deliberately, with the knowledge that it was prohibited by law, and with specific intent to violate the law. [Tr. 3-9.]

The court then distinguished "motive" and "intent":

> Motive is that which tempts, induces or moves a person to commit a crime. Intent is the purpose or mental state with which the person does the act.
>
> Now, members of the jury, motive, no matter how laudable or praiseworthy that motive may be, cannot negative a specific intent to commit a crime. [Tr. 3-11.]
>
> Also, a person may not excuse his practices that are contrary to and violate the law of the land because of his religious beliefs. Religious beliefs, theological, philosophical beliefs, honestly held, do not free individuals from responsibility to conduct themselves in obedience to the law. [Tr. 3-12.]

Again returning to the question of the power of the jury, the court charged:

> Now some jurors may believe that the Vietnam war is immoral or unconstitutional or illegal. All of us

have certain personal views. These personal views, members of the jury, of a juror cannot and must not enter into consideration of the present case. If you allow your personal beliefs as to the legality or immorality of the war in Vietnam or any political opinions with respect to the Vietnam war to affect your judgment in this case, you will be violating your oath as a juror. Such beliefs on your part have no place at all in this case.

You must decide this case, members of the jury, in accordance with the facts as you find them and the law as I have laid it down. [Tr. 3-13, 3-14.]

The First Circuit Court of Appeals denied petitioner's appeal and affirmed the proceedings in the court below.

Reasons for Granting the Writ

I. The Petitioner Asserts that his Constitutional Rights under the First Amendment are Denied by the Alternative Service Provisions of the Military Selective Service Act of 1967.

Petitioner, as others before him, challenges the limitations imposed by a federal law upon the free exercise of his religious, moral and conscientious beliefs. See, *O'Connor* v. *United States,* 415 F.2d 1110 (9th Cir. 1969) *per curiam, petition for cert. filed,* Misc. Docket, 1969. It is well recognized that the free exercise of religion clause of the First Amendment protects not merely freedom to believe, but also the right to act consistently with those beliefs where such beliefs are not injurious to the equal rights of others. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Sharp* v. *Sigler,* 408 F.2d 966 (8th Cir. 1969). Indeed freedom of religion has been characterized as having a "preferred

position'' among constitutional rights. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943). The First Amendment insures that an individual may not be compelled to perform an act inconsistent with the claims of his conscience. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). Incidental limitations on First Amendment liberties can be justified only when a supervening governmental interest is ''compelling,'' ''substantial,'' ''subordinating,'' or ''paramount.'' *United States* v. *O'Brien,* 391 U.S. 367, 376-377 (1968). Indeed when ''fundamental personal liberties'' are at stake, even government policies which are ''legitimate and substantial'' are not sufficient to curtail the exercise of those rights if the policies can be fulfilled by alternative means. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

On the basis of precedent it may be argued that limitation of protected rights is constitutional in times of national crises or emergency. *Arver* v. *United States,* 245 U.S. 366 (1918); *United States* v. *Henderson,* 180 F.2d 711 (7th Cir. 1950). Thus the war-time, peace-time issue is crucial to the issue raised by the petitioner. He, and many other concerned Americans, question the legality of our military actions in Vietnam, especially whether conscription as it is presently enforced is permissible in the absence of a declaration of war. *United States* v. *O'Brien, supra; Holmes* v. *United States,* 391 U.S. 936 (1968); *Mitchell* v. *United States,* 386 U.S. 972 (1967) (Douglas, J. dissenting opinions). Since any limitation on First Amendment freedoms can be justified only by a paramount, compelling or substantial national interest, and *Arver* and cases subsequent thereto define national interest in terms of war-time emergency, the legality of the war must be in issue in determining the constitutionality of alternative service.

The petitioner was recognized as a conscientious objector by his Local Selective Service Board. More basic to the petitioner as an individual, however, is his fundamental commitment to the principles expressed in the Quaker peace tradition. The petitioner defined these terms in the following way:

> "Perhaps the fundamental statement of the Quaker peace testimony in traditional terms was formulated in the words, 'We utterly deny all outward forms of war and strife.'
>
> "This principle as a part of Quakerism reflects again the universal respect for human life that is a fundamental part of Quaker tradition and a fundamental part of my own belief.
>
> "It also reflects another aspect of Quakerism, which is the belief of—belief in that of God in every man.
>
> "It is clear that if there is a part of God in every man, which is the fundamental part of the Quaker belief then it would be a crime against God in some sense, or doing violence to God's principles to kill men.
>
> "So from this, of course, follows a rejection of violence, a rejection of killing, and clearly a rejection of participation in war." [Tr. 2-28, 2-29.]

The petitioner's commitment to these fundamental religious, ethical and moral principles culminated in his decision to refuse to comply with the orders or directives of the Selective Service System. The act of criminal disobedience, refusal to report to his local board for civilian service, for which the petitioner has been tried and convicted, is in fact an extension of his religious and moral convictions. Petitioner expressed and asserted these convictions in a reasonable and measured manner, consistent with due recognition of the equal rights of others. The

means and manner which petitioner chose to express his conscientious opposition to the provisions of the Military Selective Service Act are expressions of a rational man — refusal to comply with an act that violates his conscience. Unlike the situation in *United States* v. *O'Brien, supra,* the petitioner's physical actions, his letter of April 24th, the return of his registration and classification cards and his eventual refusal to report for alternative service, are all so intertwined with the religious and ethical foundations of his belief as to be incapable of distinction between belief and conduct. The conscientious act, refusal to report, is an extension of his religious expression. Where, as here, the religious element cannot be distinguished from the non-religious, then the protected preferred position accorded the free exercise of religion under the First Amendment must be extended to the entire act from its beginning to its culmination.

In answer to those who say the conscientious objector does enjoy a protected status under the alternative service provisions, the petitioner asserts such service within the confines of a military system and a military law makes the conscientious objector another armament in the military establishment. To continue to hold that an exemption for military service based on religious and moral principles is a matter of congressional grace rather than constitutional right (*Clay* v. *United States,* 397 F.2d 901, 912 (5th Cir. 1968), *vacated,* 394 U.S. 310 (1969)) is to deny all meaning to the "preferred position" of religious belief and expression. Conditioning the grant of an exemption on the performance of a less burdensome form of service (*George* v. *United States,* 196 F.2d 445, 450 (9th Cir. 1952), *cert. denied,* 344 U.S. 843 (1952)) is a form of intellectual sophistry. Alternative service, participation in a scheme

of military service, is as burdensome to the petitioner, as any service in the front lines. Such participation, in violation of every conscientious and moral principle he holds, forces the conscientious objector to "aid and abet" the very system he finds most philosophically repugnant. It has, as he states "made me an 'agent of injustice' and . . . I must resist such a law with the full force of not only my words, but also my actions." Appendix B, *infra* at B-5. The petitioner asserts his constitutional right to oppose his individual participation in war and violence and, indeed, any man's participation in it. Alternative service, insofar as it aids the machinery of a military system thus violates the fundamental fabric of his religious beliefs.

The petitioner requests this Court to recognize the substance as well as the form of religious and conscientious opposition to war and any form of participation in an overall military scheme. Alternative service grants only token recognition to the principles of religious liberty. Alternative service evades the main point at issue — the petitioner's religious and moral commitment to state with his life his absolute testimony against all war and all violence. Alternative service compels the conscientious objector to participate in some manner with a system of military conscription, which in turn makes him an instrument of the government's foreign and military policy to which he is conscientiously opposed. Alternative service does not enforce or protect the religious liberty of the conscientious objector; rather it represents the subversion of conscience.

II. Under the Fifth, Sixth and Ninth Amendments the Petitioner Asserts a Constitutional Right to Appeal to His Trial Jury to Conscientiously Consider the Full Spectrum of His Acts of Conscience before Rendering Their Verdict.

The petitioner appeals to this Court to recognize the historical power of the jury to acquit even if the verdict is contrary to the law and the evidence. His claim arises against a background of national debate concerning the morality and the legality of the Vietnam war and an examination of the machinery of law which aids and supports this war. These issues have caused an irreparable division between the conscientious citizen and government policy. In the face of this division many have stepped beyond the law through acts of violence and destruction to appeal to the conscience of their fellow citizens. The petitioner here, through reasoned speech and quiet deed, appeals to the citizenry of his community to conscientiously consider the alleged criminality of his acts. This Court must halt the rigid enforcement of outdated, and indeed, unconstitutional criminal procedural law, in what is essentially a political trial of conscience. See also, *Moylan* v. *United States,* F.2d (4th Cir. 1969), *petition for cert. filed,* 38 U.S.L. Week 3202 (U.S. Nov. 25, 1969) (No. 885).

Petitioner contends that the trial court in refusing to grant the requested instructions and in the entire conduct of the trial denied him the right to a fair and impartial trial by jury and denied to the jury their right to express the community conscience in their verdict.

1. *Does the petitioner have a constitutional right to inform the jury concerning their power to acquit in the*

face of his acknowledged violation of a statute? The simple answer to this is yes. The Court of Appeals indicated that such a "broader role for the jury" would be a new doctrine and then added: "whatever the merits of this aspiration, the task of determining the desirability, feasibility, and lineaments of such a new doctrine is not for us." Appendix A, *infra* at A-11. Thus the First Circuit apparently requests this Court to weigh the merits of petitioner's claim. The court in *United States* v. *Sisson*, 294 F. Supp. 520, 524 (D.C. Mass. 1968) also reserved this question for Supreme Court decision. See *United States* v. *Sisson, petition for cert. filed*, 37 U.S.L. WEEK, 2554 (U.S. Oct. 10, 1969) (No. 305). On the other hand, the Fourth Circuit Court of Appeals recently stated in *Moylan* v. *United States, supra* at :

> "We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. *If the jury feels* that *the law* under which the defendant is accused *is unjust, or that exigent circumstances justified the actions of the accused,* or for any reason which appeals to their logic or passion, *the jury has the power to acquit, and the courts must abide by that decision.*" (Emphasis added.)

Indeed it appears the doctrine is not "new" but an ancient and honorable function of the jury system, "the great corrective of law in its actual operation." Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18 (1910). Therefore, since this is a power and a function of the jury,

the petitioner asserts that it is his right through his counsel or by court instruction to inform the jury concerning the extent of their power in this respect. To hold otherwise denies him his constitutional rights: Fifth Amendment substantive due process, Sixth Amendment impartial trial by jury, and unenumerated fundamental natural rights guaranteed under the Ninth Amendment.

Historically, the purpose of the Ninth Amendment demonstrates that it was meant to guarantee fundamental natural rights, which rights, although not expressly enumerated in the first eight amendments, were nevertheless deserving of constitutional protection. *Griswold* v. *Connecticut*, 381 U.S. 479, 492 (1964) (Goldberg, J. concurring opinion). In a trial in which conscience is a primary issue, where, as in this case, the accused does not deny the fact of his violation, his act of conscientious disobedience, his right to appeal to the jury to conscientiously weigh both fact and law is a fundamental natural right. The natural rights philosophy espoused by John Locke and magnificently endorsed by Thomas Jefferson in the Declaration of Independence was the prevailing political theory of our constitutional authors. Politically and philosophically at that time it was entirely consistent with an orderly system of justice that a juror inquire whether a particular law was consonant with his "own opinion, judgment and conscience." *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L. J. 170, 172, n.16 (1964). The trial of John Peter Zenger is an excellent example of this philosophy. Although Zenger was clearly guilty of seditious libel under the law as it then existed his jury rendered a verdict of acquittal. In that case Andrew Hamilton was

allowed to urge the jury, in the face of the judge's charge on the law:

> ". . . to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties, or estates of their fellow subjects." Alexander, J., *A Brief Narrative of the Case and Trial of John Peter Zenger,* Harv. U. Press, at 93 (1963).

Later, in another politically disturbed period in American history, juries nullified laws that affronted their conscience and refused to convict those persons who, in open defiance of federal law (the Fugitive Slave Acts), refused to surrender fugitive slaves to their pursuers. There, too, the jury was demonstrating their "power to bring in a verdict in the teeth of both law and facts." *Horning* v. *District of Columbia,* 254 U.S. 135, 138 (1920). *Sparf and Hansen* v. *United States,* 156 U.S. 51 (1895), often cited as the final repudiation of the jury's right to decide questions of law should not be controlling in a matter such as the instant case. *Sparf and Hansen* involved a crime of violence, common law murder, and the defendants did not concede the fact of their violation of the law. In criminal trials concerned with issues involving conscientious disobedience and concededly technical violations of a law which is politically disputed, the fundamental right of the accused to inform the jury of their power to conscientiously consider fact and law before rendering a verdict must be upheld.

2. *Does the petitioner have a constitutional right to have the jury consider the conscientious justification surrounding his alleged violation of a statutory duty?* Again the short answer is yes. No court can deny the petitioner the right to present the cause of his conscience to the

conscience of the community — the jury which tries him — especially where, as here, the accused claims a First Amendment right to follow the cause of his conscience. *Keegan* v. *United States*, 325 U.S. 478 (1945). The primary rationale for the federal requirement that an impartial jury represent a "fair cross-section of the community" is to permit a full application of the community conscience to the particular case before it. 28 U.S.C. §1861, as amended, 82 Stat. 54 (1968). Admittedly, "the conscience of the community is subject to many variables" but in all instances the accused should "have the benefit of that controlling principle of mercy" or application of conscientious justice which a representative cross-section of the community can grant. *Witherspoon* v. *Illinois*, 391 U.S. 510, 528 (1968) (Douglas, J. concurring opinion).

"The jury, as the conscience of the community, must be permitted to look at more than logic." *United States* v. *Spock*, 416 F.2d 165, 182 (1st Cir. 1969). Professor Freund of the Law School of Harvard University, an outstanding authority on constitutional law, has stated:

> "A jury should be allowed to acquit people who act in a measured way for reasons of conscience. . . . [W]here such conduct is motivated by conscience . . . there ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the circumstances." New York Times, Sept. 19, 1968.

Whether this doctrine is indeed "new" or an ancient unexpressed aspect of the natural power of the jury, the claim is a fundamental part of substantive due process and should be explicitly expounded by this Court. The jury must be permitted to weigh all aspects of the petitioner's

behavior. To separate motivational purpose from specific acts of conscientious disobedience denies to any such action the essential ingredient of rationality. In matters of conscientious disobedience and quiet resistance, community conscience must view conscience as well as law. To examine only the sole act of violation without considering the full development of the religious and ethical philosophy which motivated such conduct withholds from Justice all the virtues of the community conscience.

"The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly." *United States* v. *Spock, supra,* at 182. In this case, however, the entire conduct of the trial court did in fact "fetter" the jury. The court would not permit any attempt by petitioner's counsel to appeal to the conscience of the jury nor would he permit any consideration of petitioner's conscientious objectives in delineating the requisite criminal intent necessary to convict. Indeed the judge repeatedly emphasized the irrelevance of the evidence concerning the petitioner's conscientious purpose or motive. In his zeal to insure conviction by adherence to his instructions on the law, the judge prevented the jury from being informed of their power to acquit and, furthermore, prevented them from freely exercising the conscience of the community in response to an appeal of trial counsel. Since such appeal was forbidden in this case, the not so thinly-veiled threat that a juror who exercises his conscience as to the law as well as the evidence "would be violating" his juror's oath is fundamentally prejudicial. "In a criminal case a court may not order the jury to return a verdict of guilty no matter how overwhelming the evidence of guilt." *United States* v. *Spock, supra,* at 180. The trial court in

the instant case, by circumscribing and limiting the legal definition of "intent" and refusing to inform the jury concerning the power to exercise their community conscience with respect to all aspects of petitioner's behavior did, in effect, direct the jury to return a verdict of guilty. Their conscience was not free to consider any other alternative. "In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent." *United States* v. *Spock, supra,* at 181. This fundamental requirement of due process was substantially lacking in this case.

• • • • •

The petitioner asserts his right to speak and act according to the dictates of his conscience, a conscience formed and molded by the teachings of the great liberal humanitarian religious and moral philosophers of ages past and present. It is his duty, as he conceives it, to act according to his best judgment, his best conscience for the good of society and mankind. As was stated in *United States* v. *Sisson,* 297 F.Supp. 902, 909 (D.C. Mass. 1969):

> "Duty once commonly appeared as the 'stern daughter of the voice of God.' Today to many she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy."

The duty to act in accordance with sincere reasonable views is important not only to the petitioner but far reaching in its impact upon decisive areas in our national life. The precedent set at Nuremberg cannot be applauded

righteously by our nation's political leaders and ignored in our nation's courts. *Mitchell* v. *United States, supra,* at 972. If the tragedy of My Lai has any significance today it must stand for the principle that compliance with an unreasonable, unethical, inhumane order or system cannot be condoned. Although the petitioner realized that there might be a penalty to pay, a cost for his conscientious disobedience, he does not wish to martyr himself on a cross of injustice. Frustrated by his inability to move the conscience of his country by any other means, the petitioner chose the way of conscientious disobedience. As Professor Freund states, the concientious objector chooses martyrdom hoping that his action will "sear the conscience of the community" to effect a change in the law. "[I]f such people set out to be martyrs, however, it doesn't follow that the law *must* make martyrs of them." New York Times, Sept. 19, 1968.

Conclusion

It is submitted that the conduct of the trial court raises substantial constitutional issues which have not been explicitly decided by this Court. These substantial issues, which are of great public importance, now deserve decisive attention by the Supreme Court. The fundamental constitutional rights which the petitioner asserts were substantially denied to him must be affirmed by this highest Constitutional Court. For these reasons the petitioner

requests this Court to grant a writ of certiorari and order the judgment below reversed.

Respectfully submitted,

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APPENDIX FOLLOWS

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7355.

UNITED STATES OF AMERICA,
APPELLEE,
v.
RICHARD MATHER BOARDMAN,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

William M. Kunstler and *Crystal C. Lloyd*, with whom *John G. Brooks* was on brief, for appellant.

Stanislaw R. J. Suchecki, Assistant U. S. Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, was on brief, for appellee.

December 11, 1969.

COFFIN, *Circuit Judge*. Defendant was convicted in the court below of failing to report for civilian work in the national interest in violation of 50 U.S.C.App. §§ 456(j), 462. Defendant concedes that he knowingly failed to obey an order of his local board, and that the order was issued in compliance with statute and regulations. His appeal raises issues concerning the free exercise of religion, the intent requisite for conviction of crime, and the division of function between judge and jury.

The record indicates that both defendant and the Selective Service System have behaved punctiliously. Defendant was originally classified II-S while an undergraduate at Antioch College. Upon graduation, his local board placed

him in class I-O, the classification reserved for those conscientiously opposed to any form of military service. In the course of completing SSS Form 152 (Special Report for Class I-O Registrants), defendant indicated that his first choice for alternate service was the Chicago branch of the American Friends Service Committee. Defendant's local board replied that the Friends Service Committee was not an acceptable alternative to military service and advised defendant to apply for work in an approved program.

By that time, however, defendant had already begun work with the Committee as an adviser to draft registrants. Several months of negotiations concerning defendant's status ensued. Defendant terminated these negotiations by a letter to his local board in which he expressed his intent to refuse to cooperate any further with the Selective Service System. This step was prompted by defendant's belief that any system of conscription is unjust and that the practice of exempting conscientious objectors was merely a device for blunting the protests of those most vehemently opposed to militarism. Defendant's local board then ordered defendant to report for civilian work at Massachusetts General Hospital. Because of procedural irregularities, two further orders were issued, and twice more defendant refused to report. He was then indicted and convicted after a trial by jury.

On this appeal, defendant raises three objections: first, that the requirement of alternate service for conscientious objectors infringes the free exercise of religion; second, that the trial court erred in refusing to charge that the jury should consider defendant's motivation in deciding the issue of criminal intent; and finally, that the jury should have been expressly informed of its power to acquit defendant in spite of his admitted violation of the statute.

Defendant's First Amendment claim would have us make a substantial inroad on the existing law governing military

service exemptions. We rehearse briefly what that law is. It has been repeatedly recognized that exemption for military service is a matter of Congressional grace rather than constitutional compulsion. *United States* v. *McIntosh*, 283 U.S. 605, 623 (1931); *In re Summers*, 325 U.S. 561, 572-573 (1945); *Clay* v. *United States*, 397 F.2d 901, 912 (5th Cir. 1968), *vacated*, 394 U.S. 310 (1969), and cases cited. Since Congress can require everyone to submit to military discipline, the argument goes, it can also condition the grant of exemption on the performance of a less burdensome form of service. *George* v. *United States*, 196 F.2d 445, 450 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); *Kramer* v. *United States*, 147 F.2d 756, 760 (6th Cir.), *cert. denied*, 324 U.S. 1878 (1945), and cases cited.

We need not decide whether to adopt this approach, however, for even if we assume that the First Amendment require some form of exemption for those conscientiously opposed to military service, it does not follow that Congress must grant a total exemption. Congress has broad power to take all steps necessary and appropriate to raising and supporting an army. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In exercising this power, Congress may legitimately require alternate service to alleviate the unfairness which results if conscientious objectors continue to enjoy the fruits of civilian life while their fellow citizens are conscripted for onerous and sometimes hazardous duty. *Cf. Braunfeld* v. *Brown*, 366 U.S. 599, 608, 609 (1961). Congress may also require alternate service to avoid the difficulties implicit in granting a total exemption based on individual belief, such as the potential threat to the morale of the armed forces *Howze* v. *United States*, 272 F.2d 146, 148 (9th Cir. 1959), or the problem of distinguishing self-serving claims from beliefs which deserve the title "conscientious". *Weightman* v. *United States*, 142 F.2d 188, 191, 192 (1st Cir. 1944).

Defendant impliedly rejects this conventional wisdom.

The First Amendment, he argues, protects religiously motivated conduct unless that conduct poses some substantial peril to the public health or safety. This stringent test, he maintains, should be applied even if the individual's objection is not to the conduct which the government seeks to compel, but to the national policy which that conduct promotes. Counsel for defendant made clear at oral argument that this principle would equally apply to one who refused to pay his income tax because of conscientious objections to the war in Vietnam.

Such a view of the First Amendment is, we think, overly solipsistic. The Constitution does not extend the same degree of protection to every manifestation of religious impulse. The strict standard which defendant invokes may be appropriate when the government seeks to regulate acts of worship,[1] or to compel conduct which violates a cardinal tenet of religious faith.[2] In this case, however, defendant has been ordered to work in a hospital, an employment in which he has already engaged without violence to his principles.[3] Defendant objects not to the specific conduct which the government requires, but to cooperation with a system which he considers wicked. But, in the words of Mr. Justice Cardozo,

> "Never in our history has the notion been accepted . . . that acts thus indirectly related to service in the camp

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[1] *E.g.*, *People* v. *Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (regulation of peyote used in religious ritual).

[2] *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (denial of unemployment compensation to Sabbatarians); *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963) (compulsory jury duty); *United States* v. *Sisson*, 297 F. Supp. 902 (D.Mass. 1969), *review granted*, 38 U.S.L.W. 3127 (U.S. Oct. 14, 1969) (No. 305) (compulsory military service). For a discussion identifying the variables to be assessed, *see* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development — Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1390, 1411-13 (1967).

[3] Defendant's SSS Form 152 indicates that he has worked at three different hospitals as a scrub nurse, lab technician, and research assistant.

> or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state.... [A] different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Hamilton* v. *Board of Regents,* 293 U.S. 245, 267, 268 (1934) (concurring).

Defendant nevertheless argues that even if the First Amendment does not immunize his conduct from regulation, at least the government should have the burden of showing that no less restrictive form of regulation could accomplish its purposes, citing *Sherbert* v. *Verner,* 374 U.S. at 407. In *Sherbert,* however, the action of the state imposed a burden on the observance of the Sabbath, a practice which obviously is a cardinal element in the exercise of a religion. Moreover, in *Sherbert,* the state had made no effort to accommodate the religious practice in question. In this case, by contrast, Congress has deferred to the demands of conscience by requiring conscientious objectors to perform alternate service rather than submit to induction. Perhaps there are other ways in which Congress could have struck the balance between conscience and the needs of the Selective Service System, but at some point courts must defer to the Congressional judgment concerning what is necessary and appropriate. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316 (1819). We think that point has been reached here.

Defendant's second attack focuses on the trial court's instructions concerning the mental element of the offense

charged. The court told the jury that the term "willfully" as used in the indictment meant that the defendant acted with knowledge that his conduct was prohibited by law, and with specific intent to violate the law. The court then distinguished "motive" and "intent":

> "Motive is that which tempts, induces or moves a person to commit a crime. Intent is the purpose or mental state with which the person does the act. Now, members of the jury, motive, no matter how laudable or praiseworthy that motive may be, cannot negative a specificate intent to commit a crime. . . . Where a person has a specific intent to bring about a result which the law seeks to prevent, what induces him to act, his motive, is immaterial."

In keeping with this instruction, the trial court rebuffed all attempts by defense counsel to demonstrate defendant's good moral character or to explore the reasonableness of defendant's beliefs concerning the draft and the war in Vietnam.

Defendant criticizes these rulings on the ground that the term "willfully" as used in the indictment includes not only an intent to violate the statute, but also a venal or ignoble motive. Two arguments support this proposition: first, defendant maintains that criminal liability in general requires the "concurrence of an evil-meaning mind with an evil-doing hand";[4] second, defendant argues that a good faith belief in the unconstitutionality of government action excuses otherwise criminal conduct.

Defendant's first argument attempts to transform occasionally pertinent language into black letter law. Defendant cites a miscellany of cases which use the phrase "bad purpose" in describing the mental element necessary for criminal culpability. In context, this phrase serves as a convenient shorthand expression to distinguish liability

[4] *Morissette* v. *United States*, 342 U.S. 246, 251 (1952).

In the case at bar, however, there was no misunderstanding of what the law required, and the power of Congress to impose such requirements has long been settled. Defendant disobeyed a well-settled requirement in order to protest the entire conscription system, and hopefully to make new law, but that does not give him immunity from the sanctions of the old law if he is unsuccessful in his efforts. Had the defendant in *Murdock* refused to divulge tax information because he conscientiously felt that the capital gains provisions were immoral or that deficit spending was contrary to Scripture, he would have fared no better. Congress may not have intended to punish good-faith misunderstanding, but Congress obviously did not intend to carve out a universal exception for test-cases.

Keegan does not, we think, enlarge the scope of *Murdock,* but is addressed to a different problem. There the defendants were prosecuted for conspiracy to counsel draft evasion, there being at that time no sanction for counselling refusal to serve. The majority viewed the evidence as limited to counselling refusal to serve.[9] In this context, Mr. Justice Roberts added a cryptic and ambiguous dictum:

> "One with innocent motives, who honestly believes a law unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command. . . ." 325 U.S. at 493-4.

We construe this as describing the conduct of the defendants and contrasting it with evasion, not—as has been the interpretation of some—as proclaiming a novel doctrine that one may with impunity counsel or engage in disobedi-

[9] Defendants, officers of the German-American Bund, had ordered Bund members to register for the draft but to refuse service because of an amendment to the selective service law which proscribed filling any draft-created job vacancy with a Bund member.

ence of a squarely applicable law in order to provoke a test case. We are strengthened in this reading not only by the ambiguity and brevity of the quoted passage, but by the concurrence on separate grounds of two Justices and the specific rejection of the test-case-in-good-faith doctrine by four dissenters.[10] *Okamoto*, it is true, seized on the dictum and gave it broad reach. We would agree with the result, but only for the reasons advanced by the dissent, namely, this was *Keegan* replayed. Subsequent progeny have been few and conflicting.[11]

Defendant's final objection concerns the trial court's refusal to instruct the jury that it had the power to acquit defendant even though he was guilty of the offense charged. The court's refusal was clearly correct. The doctrine that juries are judges of the law as well as the facts in criminal cases has enjoyed a rich and varied history, but this doctrine was decisively rejected during the nineteenth century. Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939). Today jurors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed. *Sparf & Hansen* v. *United States*, 156 U.S. 51 (1895). Our holding in *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969), that judges could not "catechize" criminal juries through the use of special questions was meant to preserve the existing balance between judge and jury, not to break new

[10] We note also that both *Keegan* and *Murdock* were from the pen of Mr. Justice Roberts, but neither he nor the writers of the three other opinions in *Keegan* made reference to *Murdock*.

[11] The 10th Circuit has limited *Okamoto* to cases of counselling disobedience as distinguished from actual violations of the terms of a statute. *Warren* v. *United States*, 177 F.2d 596, 600 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); *see also*, *Brooks* v. *Auburn University*, 296 F. Supp. 188, 195 (M.D.Ala. 1969) (dictum). *Keegan* and *Okamoto* have also been read as bearing on the intent necessary to prove a criminal conspiracy. *Holdridge* v. *United States*, 282 F.2d 302, 310-311 (8th Cir. 1960); *contra*, *Lantis* v. *United States*, 186 F.2d 91, 92-3 (9th Cir. 1950).

ground. There have been recent suggestions that a broader role for the jury would be desirable in some cases. Professor Freund, for example, has suggested that "There ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the circumstances" in cases involving "people who act in a measured way for reasons of conscience...." New York Times, Sept. 19, 1968. Whatever the merits of this aspiration, the task of determining the desirability, feasibility, and lineaments of such a new doctrine is not for us.

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Boston, Mass.

APPENDIX B

LETTER FROM RICHARD M. BOARDMAN TO LOCAL BOARD NO. 114

906 W. Montrose
Chicago, Illinois 60613
24 April 1967

Local Board No. 114
Middlesex County
34 Commonwealth Ave.
West Concord, Mass.

Gentlemen:

I am writing to return my draft cards and to inform you that I am no longer able to comply with the Selective Service System. I will no longer carry a draft card or comply with any directives from the Selective Service System. To do so would be to violate the dictates of my conscience and thus do a disservice to myself, my country, and humanity.

I understand that by refusing to comply with the Selective Service System I will be breaking the law. I understand that the penalties imposed by the government on "non-cooperators" have not been light and for a long time this knowledge has prevented me from severing my connection with Selective Service. For a long time I thought that I could rest with an easy conscience if only I could establish recognition as a conscientious objector. I felt that it was participation in the military that I was rejecting and not conscription itself. I thought that as long as I was not compelled to participate directly in a system that has been established to do violence to human beings (like most violence, done in the name of freedom, justice and self-defence), that as long as I could be assured of exemption from this system, I need not resist registration with the Selective Service System.

When my claim as a conscientious objector was recognized I was pleased and began to think that perhaps we had a very "reasonable" system of conscription after all. I found myself thinking that it's a very good system of conscription that "allows" a man to try to help his fellows to live constructively instead of destructively. I had failed to stop to question by what authority it came to be that a man should have to justify this creative inclination to his draft board. I had failed to realize that my deferment as a CO was a convenient way by which my resistance to conscription and the military (and the resistance of thousands like me) was effectively silenced. I had failed to acknowl-

edge that my claim as a conscientious objector was only begrudgingly given to me because my "credentials" were good, because I was articulate, because my education had made it easy for me to produce a convincing defence of my desire to live peaceably and lovingly; in short, because I fell within a certain small, carefully defined group to whom the government felt it was both wise and safe to give deferments; wise, because otherwise this small group might raise some embarrassing questions about the legitimacy of conscription and militarism, and safe because the group is small enough so as to have little influence on the populace at large.

When I applied for recognition of my job as a draft counselor with the American Friends Service Committee as suitable civilian work in lieu of military service, I found myself trying to defend my request in terms of my work there being "in the national interest." I had compromised my own orientation, which is to do work in the interest of all humanity, and had tried to defend my work on false grounds. False, not because my work is not in the "national interest," but because work in the interest of all humanity has a prior claim to work "in the national interest."

I didn't stop to ask how it is that the draft board's judgment about what constitutes "work in the national interest" should be considered any more legitimate than mine, or any more legitimate than that of the American Friends Service Committee, until my board decided to reject my proposed alternative service work. But even when I realized the arbitrariness of this unilateral decision by the board, I began to swallow my protest and my conscientious objection to such an undemocratic procedure, and for a month I looked for another, "more acceptable" job. I have found several jobs that would be acceptable to my board, but I have decided that the whole procedure is unacceptable to me and my value orientation. I have decided that the hypocrisy must end, that the inconsistency of my moral stance must be rectified and that I cannot accept an elitist I-O deferment from Selective Service any more than I can accept a IA-O, and for the same reason: to accept any classification is to tacitly accept the legitimacy of the system of conscription and the military for which conscription exists.

I cannot do this. As a pacifist I must totally reject both conscription and militarism. As one brought up to believe in the American principles of individualism and voluntarism I must reject any system of imposed and involuntary recruitment of manpower, and as one brought up to believe in the basic equality of all people and to respect the law only when it is equally administered to all citizens regardless of race, creed, color, social class or education, I must reject a system of conscription

that defers the most fortunate members of society and forces the least fortunate to bear the burden of responsibility and risk in the military.

It must be difficult for men in your position to understand why a man chooses to take a position in relation to the Selective Service System and the military that will result in his being considered foolish and unrealistically idealistic, and may result in his prosecution and imprisonment for violating the law. I would like to take this opportunity to try to give an idea of the kind of thinking that has led me to take this position.

My thinking is both idealistic and very practical, religious and political, and I will try to acquaint you with some of the major considerations in both areas of my thinking.

The aspects of human existence that make life meaningful and fulfilling are psychological, social, and religious, and stem from the nature of men's relationships with each other. Mere existence is empty and barren, but human existence gains meaning and value through the development of loving human relationships. Material things have no intrinsic worth, they bring no satisfaction except in a social context. A rich man in isolation is miserable, but a poor man in love is filled with joy.

These observations lead me to conclude that the quality of human relations is always more important than the quantity of material things. And when we must choose between pursuing material things or human relations we are wisest and happiest when we choose the latter. This is also true in relation to politics, economics and other spheres of human activity. We defeat ourselves when we place a higher value on any of these things than we do on loving human relations. Thus, I have come to believe that a man's first commitment must be to human values and not material things. Armies, wars, and violence are the means of achieving material, not spiritual or human ends, and must be rejected.

The implications of this kind of thinking relate directly to the problem of determining what kinds of activities are "in the national interest." From this orientation, for example, we see that it is not in the national interest to place a higher value on material things than on human lives. It is not in the national interest to spend human lives in order to save dollars. It is not in the national interest to maintain "the balance of power," or to protect the "interests of the west" by sacrificing the prior claim of human values.

It is the development of better human relationships and social structures that is "in the national interest." This goal can only be achieved by bringing about conditions that will directly develop and enhance a

creative human environment. I believe wholeheartedly that ends and means are inseparable: that, as Gandhi said, "the means is the end in the making." For this reason violence can never be successful in bringing about peace: coercion and tyranny will never work successfully in the "defence of freedom," and any contribution that one may make to supporting or cooperating with the system of organized violence we call "the military," will be directly opposing the human values, relationships, and social structures that men hope to develop in the world.

The weapons that one must use in the defence of freedom, or with which to build a better world, are the weapons that are commensurate with the ends they are used to achieve. These are the weapons of truth, of love, of charity, of equality, of understanding, of community. They are used to create rather than to destroy, to build a world devoted to developing the community of humanity rather than defending the divisive and limited interests of this or that individual, group, or nation.

The best place to begin creating a better world is at home. The first place for me to make a contribution to the goal of creating a better world is in my own behavior and way of life. It would seem that it should be easy for me to cooperate with the Selective Service System and the military. It would seem that it should be easy for me to accept one of a number of possible jobs as "civilian work in lieu of military service." I am a recognized conscientious objector. I will be engaged in work that is "in the national interest" for the rest of my life. Why then must I refuse to cooperate with my fellow citizens? Why do I insist on making myself difficult?

One way to answer these questions is by referring to the possible relevance of living one's life according to the dictates of an impossible ideal. Socrates, Christ, Gandhi and others felt that they must live their lives in accordance with ideals that were seemingly irrelevant, impractical, and impossible under the prevailing conditions of the world in which they were living. The world would have lost much if these men had not seen fit to become impractical idealists and nuisances to their societies. Some groups of people, like the Quakers, have also tried to live their lives according to principles that demand actions that run contrary to the norms of the greater community, and they too have had to suffer the consequences of their non-conformity.

But these individuals and groups have persisted in living according to their principles—in a world that continually presses them to abandon principle and conform to the prevailing modes of behavior—because they have believed (as Isaac Pennington wrote in 1661, speaking of the peaceable kingdom foretold by prophecy) that,

> Whensoever such a thing shall be brought forth in the world it must have a beginning before it can grow and be perfected. And where should it begin but in some particulars [individuals] in a nation, and so spread by degrees? Therefore whoever desires to see this lovely state brought forth in the general, must cherish it in the particular.

The men who live their lives according to principle believe that they can most fully lend their support to the development of freedom and love by setting a living example of those qualities for their fellows. They know of no better way of achieving peace than by living peaceably with their neighbors; they know of no better way of developing a social climate in which men will be free and equal than by treating all men honestly and equally; they know of no better way of helping men to learn to love each other than by treating them lovingly. They know, in short, of no surer way of making the world a better place than by leading better lives themselves. And this they must do whether the laws permit it or not. For they realize, as Thoreau pointed out, that "Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice."

I hope that my refusal to cooperate with Selective Service will be seen as an effort to continue in the tradition of the individuals and groups I have spoken of here. I have come to see that the law requires that I be less than just, less than honest, less than human. It has, indeed, made me an "agent of injustice," and I find that I must resist such a law with the full force of not only words, but also my actions. I hope that you will recognize the faith I have in the power that my example may have for helping others to work to make the world a better place. For this is the spirit in which my act is taken.

The political or practical basis for my disobedience relates, again, to my conception of work "in the national interest." As I see it the work that I am doing as a draft counselor with the American Friends Service Committee is not only in the national interest, it is in the interest of all of humanity. Resisting evil, in whatever form it takes, is in the best interest of mankind. By resisting the draft I am combatting the first ranks in the forces of an evil system—the military—that affects all young men throughout the United States.

I will try to make clear some of the more practical reasons why I feel that the military and conscription must be resisted. The evil effects of conscription are so numerous as to be impossible to catalog in detail, but some of its most destructive aspects are these:

1. The draft forces young men to become part of the military machine, the primary purpose of which is to kill human beings. The

draft forces young men—at a critical time in their lives, during which they are exploring values and trying to establish their own ethical orientations—to acquiesce to and participate in the military establishment which has its own uniquely pernicious value system that reverses most of the positive and creative values of humanity and undermines their influence in the lives of America's youth.

The best soldier, the Armed Forces teach us—contrary to our Christian tradition of values—is the most efficient murderer. The feeble voice of humanity's "Thou shalt not kill," is drowned out by the sergeant's roaring "Thou shalt kill and kill well!"

"All men are brothers," we learn in our Sunday Schools. But the Army teaches, "The best soldier is the one who makes the clearest distinction between the 'good guys.' The best soldier realizes soonest that all men are brothers except the 'Japs,' the 'Krauts,' the 'Commies,' the 'VC.' "

The best soldier ignores religion, God, and his conscience and learns to "follow orders." The best soldier can kill without thinking twice about it because he realizes that it is "his job" to do so.

These are the values that our society has decided to instill into the minds, hearts and reflexes of its youth. These are the values that I must reject. These are the values that are contrary to "the national interest." This is why draft resistance is work in "the national interest," and in the interest of all humanity.

2. The deferment system is an elitist system that serves the wealthy and privileged and feeds on the less prestigious. The draft obligation subtly forces the nation's youth into positions that a few power holders and policy makers deem to be in the "national interest," obliging them to move into professional and academic careers that they may not have chosen except for the fact that the military is their only alternative if they drop out of school. These inequities and manipulative "channeling" techniques are widely acknowledged and I need not expand on them here.

3. A curious double standard of social morality is introduced by our draft system—a double standard that should be examined.

There are only two small groups of draft registrants who are allowed to live according to the Judaeo-Christian principles and values which the great majority of registrants espouse. These groups are the ministers (IV-D) and the conscientious objectors (I-O or IA-O).

Ministers (though their prestige seems to have diminished in recent years) are held in high esteem by the community at large. They are looked to for ethical and spiritual guidance; their conduct is expected to be exemplary; they are highly respected members of the community.

The conscientious objector's position is much less prestigious. Indeed, the conscientious objector is generally regarded with suspicion or ridicule, particularly if he is not a member of a church with an historic peace tradition. The conscientious objector is often looked upon as a coward, a shirker, or some other kind of "draft dodger," by the general public. The law, however, respects the right of individual conscience (at least as long as it offers no substantial threat to the maintenance of the status quo) and, begrudgingly, respects the conscientious objector who claims a sincere refusal to participate "in war in any form," if he agrees to serve two years of civilian work (that his draft board determines is) in "the national interest."

Although it would seem quite laudable (from the religious perspective) for a Christian to refuse to "participate in war in any form," particularly in view of the Christian's professed commitment to adhere to the injunction to "turn the other cheek," and the imperative, "Thou shalt not kill," it is very difficult for a man to establish grounds for being recognized as a conscientious objector. Most men who imitate their ministers or follow their Christian commandments are discouraged in their moral consistency and distrusted by their society. Many are even punished for their attempts to live exemplary lives.

One would think (from the human perspective) that our society would demand that its young men should show cause why they *can* become soldiers—and if need be, to kill—in all good conscience. Instead, from the military perspective of our society, we insist that a young man must show cause why he should be allowed *to refuse* to kill, to refuse to participate in the Army.

4. The double standard referred to above is just one of the many paradoxes that plague our schizophrenic society. It is our dual commitment to humanitarian principles and militarism, to mercy and murder, that cripples our society spiritually and ethically, and contains the seeds of its own destruction. For, as Christ said two thousand years ago, "Every kingdom divided against itself is laid waste, and no city or house divided against itself will stand." (Matt. 12:25)

Because this saying is true, not only of nations, kingdoms, cities, and houses, but also of individuals, I find that I must refuse to comply further with the demands of the Selective Service System. I have tried my best to arrange a compromise—only to discover that by compromising my adherence to very basic, human, ethical principles—I defeat myself and do a disservice to mankind's best interests.

> No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and Mammon. (Matt. 6:24)

I cannot truly serve the interests of humanity, and at the same time comply with the Selective Service System.

Yours in Peace,

Richard M. Boardman

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1162

RICHARD MATHER BOARDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1969 (2 R. 22). On December 18, 1969, Mr. Justice Brennan extended petitioner's time for filing a petition for a writ of certiorari until

February 9, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirement of the Selective Service Act that registrants conscientiously opposed to military service render civilian service in its stead unconstitutionally abridges their religious liberty.

2. Whether petitioner had a right to have the jury instructed that it should acquit if it believed that his refusal to report for alternative civilian service had been conscientiously motivated.

3. Whether the jury should have been informed that it had the power to acquit petitioner even if he was guilty of the statutory offense.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Massachusetts of willfully failing to comply with an order of his local draft board directing him to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 456(j) and 462. On April 21, 1969, he was sentenced to three years' imprisonment (1 R. 7). The court of appeals affirmed.

The undisputed evidence showed that petitioner, a registrant whose claim to conscientious objector status (Class I-O) had been duly recognized by his local board, deliberately disobeyed an order of the board, issued in accordance with the Selective Serv-

ice Act and regulations, directing him to report for civilian hospital work in lieu of induction. Petitioner's stated reason for so refusing, articulated in letters to the board, was that the entire Selective Service System, including the Act's provisions for alternative service for registrants conscientiously opposed to military service, was offensive to his religious convictions (Pet. App. B; 1 R. 116). Those convictions, he said, precluded him from cooperating with the System in any manner, even to the extent of taking advantage of the provisions for such alternative service (Pet. 5; Pet. App. A2).

ARGUMENT

1. There is no merit in petitioner's claim that the requirement of the Selective Service Act that those conscientiously opposed to military service render civilian service in its stead unconstitutionally abridges the religious liberty of such registrants (Pet. 8-12). The substance of this contention has repeatedly been rejected. *O'Connor* v. *United States*, 415 F. 2d 1110, 1111 (C.A. 9), certiorari denied March 2, 1970, No. 1285 Misc., this Term; *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892; *United States* v. *Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Atherton* v. *United States*, 176 F. 2d 835, 842 (C.A. 9), certiorari denied, 338 U.S. 938; *Kramer* v. *United States*, 147 F. 2d 756 (C.A. 6), certiorari denied, 324 U.S. 878; *Rase* v. *United States*, 129 F. 2d 204, 210 (C.A. 6). This Court has often recognized that "[t]he conscientious

objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him." *United States* v. *Macintosh*, 283 U.S. 605, 623;[1] cf. *In re Summers*, 325 U.S. 561, 572-573; *Hamilton* v. *Regents*, 293 U.S. 245, 263-264; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29. Congress, therefore, clearly has the power to condition the grant of exemption on the performance of a less burdensome form of service. *George* v. *United States*, 196 F. 2d 445, 450 (C.A. 9), certiorari denied, 344 U.S. 843; *Kramer* v. *United States*, *supra*, 147 F. 2d at 758-759. Moreover, even if it be assumed, *arguendo*, that the First Amendment requires some form of exemption for registrants who are conscientiously opposed to military service, it would not follow, as petitioner argues, that the exemption must be total and unconditional. In exercising its broad power to take all steps necessary and proper to raising and supporting an army (*United States* v. *O'Brien*, 391 U.S. 367, 377), Congress, as the court of appeals pointed out (Pet. App. A3), can legitimately require alternative civilian service from conscientious objectors for such valid legislative purposes as to alleviate the unfairness that would result if registrants so classified continued to enjoy the benefits of wholly unsupervised civilian life while other registrants were

[1] The dissent in *Macintosh* did not question the stated principle (see *In re Summers*, 325 U.S. 561, 572-573), nor did *Girouard* v. *United States*, 328 U.S. 61, in which *Macintosh* was overruled on another issue.

required to submit to the hardships and hazards of conscription (cf. *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609), to prevent the threat to the morale of those conscripted which a grant of total CO exemption might well entail (cf. *Howze* v. *United States*, 272 F. 2d 146, 148 (C.A. 9)), and to facilitate solution of the formidable problem of distinguishing genuine from fraudulent claims to the privileged status (cf. *Weightman* v. *United States*, 142 F. 2d 188, 191-192 (C.A. 1)).

2. Equally invalid is the contention of petitioner that he had a right to have the jury instructed that it should acquit if it believed that his refusal to report had been conscientiously motivated (Pet. 16-20). Such an instruction would have fundamentally confused the notions of motive and intent. Criminal intent, the only mental element required to be proved, is the willful and deliberate purpose to do what a valid law forbids (or, as here, to abstain from doing what is commanded). Cf. *Morissette* v. *United States*, 342 U.S. 246, 250-263; *Browder* v. *United States*, 312 U.S. 335, 341-342; *Ellis* v. *United States*, 206 U.S. 246, 257; *United States* v. *Moylan*, 417 F. 2d 1002, 1004-1005 (C.A. 4), certiorari denied February 24, 1970, No. 885, this Term. That petitioner acted with such deliberate purpose was here plainly established, as he acknowledges. The question *why* the accused did what he did is irrelevant to the issue of guilt or innocence. *United States* v. *Moylan*, *supra*; *United States* v. *Henderson*, 180 F. 2d 711, 716 (C.A. 7), certiorari denied, 339 U.S. 963; *United*

States v. *Madole*, 145 F. 2d 466, 467-468 (C.A. 2); 1 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957), § 64. It is pertinent, at most, to the sentencing process. The notion that prohibited conduct may be committed with impunity if the accused believes it morally or religiously justified was said in *United States* v. *Madole*, *supra*, in an identical context, not to merit discussion. As this Court observed in *Ellis* v. *United States*, *supra*, 206 U.S. at 257, "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

3. Nor is there substance to petitioner's claim that the jury should have been told that it had the power to acquit him even though he was guilty of the offense charged (Pet. 13-16). *Berra* v. *United States*, 351 U.S. 131, 134; *Horning* v. *District of Columbia*, 254 U.S. 135, 138-139; *Hepner* v. *United States*, 213 U.S. 103, 114; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 101-103; *United States* v. *Moylan*, *supra*, 417 F. 2d at 1005-1007. That the jury has the power to bring in a verdict "in the teeth of both law and facts" (*Horning* v. *District of Columbia*, *supra*, 254 U.S. at 138) does not mean, as Judge Sobeloff observed in *United States* v. *Moylan*, *supra*, that the jury should be encouraged in such lawlessness (417 F. 2d at 1006). "[J]urors may have the power to ignore the law," as the court below noted, "but their duty is to apply the law as interpreted by the court, and they should be so instructed" (Pet. App. A10).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. [redacted]1162

RICHARD MATHER BOARDMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1106

RICHARD MATHER BOARDMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

The brief for the United States in opposition to Richard Mather Boardman's petition for a writ of certiorari dismisses several of the petitioner's arguments in a surprisingly perfunctory manner, unbefitting the significance of the basic issues involved. It is true that the asserted right to freedom of religious conscience has clashed many times with the restrictions of the Military Selective Service Act. This conflict between moral conscience and national military "necessity" has all too often been resolved against the conscientious dissenter. But the petitioner asserts that the principles of *stare decisis* do not cement immovable walls of judicial precedent around an asserted constitutional right. One need only to review the courtroom struggle from *Plessy* v. *Ferguson,* (163 U.S. 537

(1896)) through *Brown* v. *Board of Education,* (347 U.S. 483 (1954)), or *Weeks* v. *United States* (232 U.S. 383 (1914)) through *Mapp* v. *Ohio,* (367 U.S. 643 (1961))—to cite two most recent examples—to realize that judicial law can be a creative dynamic force. The creative force of law responds to the pressure of logical systematic developments, both legal and factual. Thus, each case must be reviewed on its facts as well as its law. Certainly it perverts the entire value of judicial appeal to deny all "merit" to the petitioner's claim for review of a prior legal position when such position was founded on a factual situation not now before this Court (Govt. Brief 3, 5).

While *United States* v. *Moylan,* (417 F.2d 1002 (4th Cir.), cert. denied, February 24, 1970, No. 885) referred to in both petitioner and Government briefs, raised some of the same issues as the *Boardman* case, the denial of certiorari in that case should not be considered precedent in this instance. The facts differ in one fundamental respect: the crime in *Moylan* was one of violence and destruction. (Cf. *Sparf and Hansen,* 156 U.S. 51 (1895)).

The Government has not responded to the issue in the instant case that, through his rulings of law during the trial, his comments throughout the trial, and his charge to the jury, the trial judge all but directed the jury to return a verdict of guilty. Such abridgment of the constitutional rights of the criminal defendant to a fair and impartial jury cannot be countenanced. This is especially so in a case of conscientious dissent. "In a case of conscience, the defendant is being prosecuted because he has protested against a policy of the state. The victims of the crime are the persons who are in power at the time and who are making policy for the government." Van Dyke, *The Jury as a Political Institution,* The Center Magazine, 17, 24 (March 1970). In such instance only a jury "unfettered, directly

or indirectly'' stands between the policymakers and the conscientious defendants; they have the power to repudiate the state's policy with a verdict of acquittal.

In a criminal case, each step in the prosecution process is to some extent discretionary. The policeman exercises discretion in the initial arresting process, the grand jury exercises discretion in the indictment process, the trial judge exercises discretion in his courtroom procedure. The jury, too, exercises discretion in the conviction process. These various layers of discretionary procedures are safeguards accorded by our accusatory system to the criminal defendant. When the jury is denied complete and unfettered knowledge of the full extent of its discretionary power, the accused is deprived of one of his safeguards. Additionally, in the criminal process, the jury is able to be merciful. Unlike the policeman, the prosecutor, and the judge, the jury alone will not be required at some later time to answer for its acts.

Jury mercy is not equatable with jury "lawlessness." Govt. Brief 6, citing *United States* v. *Moylan, supra* at 1006. A jury that tempers or mitigates the harshness of a law with respect to one individual after giving due consideration to *all* the *relevant* facts including the field of conscience in which the individual moved, exercises its powers of mercy. A jury that disregards the law without full consideration of the individual and the law acts lawlessly. The distinction is not academic word-play; it is a distinction fundamental to the institution of the jury within our system of law. The bias toward mercy which may be within a given community must be allowed its full range of expression in the same manner as the bias toward the sanctity of the law. Neither one bias nor the other should thwart the freedom of the impartial jury. A judge that states he is the sole arbiter of the law—particularly in

cases of conscience—without in some manner informing the jury of their role as the conscience of the community, inhibits, and indeed, prohibits, this merciful function of the jury.

The time is now ripe for this Court to re-examine the role of the judge and jury in a criminal case involving issues of conscience. The right of the defense to have an impartial and unfettered jury play their role of community conscience must be emphatically asserted. As the "perturbed spirit" of dissenting conscience becomes more apparent within our society, jurors must be made aware of their power to temper the law with mercy with respect to a particular defendant, a particular act of dissent and a particular law. At the very least, the jury must not explicitly be threatened out of using their conscientious discretion. "The argument today is only that the jury has the right to mitigate existing laws and that this right is a basic safeguard against an oppressive or even a merely overly aggressive government." Van Dyke, *The Jury as a Political Institution, supra* at 19. The recent Chicago conspiracy trial witnessed defense counsel and United States District Judge Julius J. Hoffman tangle with this issue from the very beginning of that lengthy trial.

The case of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) emphasizes the important dual nature of the jury's function: the role of the fact-finder and the *politically* responsive role. As Justice White states at 155-156:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to

protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."

The rationale behind this decision and *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) leads to the conclusion that "juries should be encouraged to play a greater role in questioning the government's laws." Van Dyke, *The Jury as a Political Institution, supra* at 22. If "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system" (*Witherspoon* v. *Illinois, supra* at 519 n.15) then it must be given the authority to reject judicial instructions when they conflict with the values of society.

Collecting material for her book on the recent Spock trial, Jessica Mitford interviewed several of the jurors after the trial. One of these jurors said to her, referring to Judge

Ford's charge in that case: "Of course you wonder if you made the right decision; *but the way the judge charged us, there was no choice.*" Mitford, J., *The Trial of Dr. Spock*, Knopf, 1969 at 234 (emphasis added.) As in the Spock case, Judge Ford's charge in the instant case left the jury no choice. The public function of ultimate discretion was denied the jury by the judge's charge.

It is obvious that the procedural problems of the political trial of conscience are immediate and pressing. The need for plenary review of the action below is indisputable; for that reason and the reasons stated before, the petitioner requests this Court to grant the writ of certiorari and order the judgment below reversed.

Respectfully Submitted

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